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Proposed right of press publishers: a workable solution?

THIS ARTICLE

- This article examines the possibilities to protect press content under existing copyright and competition law and the main features of the neighbouring press publishers' right recently proposed by the European Commission.
- The article also discusses to what extent the proposed right might address the problems identified by the Commission and further identifies problems that the adoption of an over-extensive neighbouring right could create.
- The proposed rights fail to differentiate online services and how they use online news content, which threatens legitimate interests, such as freedom of expression, associated with online services.

I. Introduction

The European Commission has identified difficulties that press publishers face in enforcing and licensing rights to news content for use in different kinds of online services. These stem from limitations and practical difficulties under current copyright law at the level of both the EU and individual Member States.¹ Moreover, press publishers are facing challenges due to digitalization and the rise of intermediary platforms that capture a substantial share of advertising income. Platforms and services that utilize third-party news content include news aggregation services and reading services, social media services and search engines. They consolidate content from multiple sources and are often more alluring for users than newspapers' own websites.²

Press publishers have accused news aggregation services of free-riding on news content produced by publishers. The European Commission has recognized that obstacles to being fairly rewarded may threaten the functioning and vitality of the press sector. To address these concerns, the Commission has proposed that press publishers be granted a neighbouring right under Art. 11 of the proposal for a Directive on copyright in the Digital Single Market.³ The new neighbouring right would cover reproduction and making available to the public press publications to the extent that digital uses are concerned. According to the Commission, this right would address problems in protecting content and improve the bargaining position of press publishers.⁴

The proposal leaves unanswered several questions about the need for, and desirability of, the proposed right. In particular, it may be asked to what extent press publishers cannot address the problems

identified under the current law and whether the proposed right is a workable solution. This article examines these issues and proceeds as follows. First, it examines the possibilities under current copyright and competition law for press publishers to protect and license press content to news aggregators and other online services (Section II.). Secondly, the article outlines the features of the proposed press publishers' right and discusses how the proposed right might address the problems identified by the Commission (Section III.). Thirdly, the contribution examines the problems that a very extensive right might create by undermining legitimate interests served by different kinds of online services using news content (Section IV.). The article's conclusions are offered in Section V.

II. Current legislative framework for protecting and licensing news content to online services

Various kinds of online services allow users to discover and consume news content that originates from third-party websites and other sources. These include services that can be characterized as news aggregators and various other types of online services, such as social media. Where news material is utilized in such services without the consent of its rights owner, press publishers may be able to demand that the services obtain a licence or, lacking that, cease unauthorized use. Below, the possibilities of news publishers to do so under existing copyright and competition law are examined.

1. Features of news aggregation services – copyright assessment

News aggregation services are often based on utilization of linking and technologies such as RSS feeds and crawling. Collecting and displaying snippets may constitute acts of reproduction and making available to the public a part of a copyright-protected work. In social media services, users can link to news articles and share news content. In some cases press publishers even actively promote use of their news articles in social media services by enabling sharing on their own site or by doing so themselves. Each of these actions and features of services must be evaluated independently in the context of copyright.

One aspect of significant relevance is what kind of display of a headline or snippet is relevant as an act of reproduction or communication to the public. If a headline or snippet is short enough, it may not constitute a part of the work that could be deemed to be an expression of the intellectual creation of the author.⁵ However, the Court of Justice of the European Union (CJEU) ruled in *Infopaq International v. Danske Dagblades Forening* that storing an extract of a protected work comprising eleven words and printing out that extract is an act of reproduction within the concept of reproduction in part within the meaning of Art. 2 of the InfoSoc Directive, if the elements are the expression of the intellectual creation of their author.⁶ Headlines and snippets offered by news aggregation services often consist of more than eleven words. While it depends on the particular case at issue whether or not a headline or content of a snippet exceeds such a state of originality that it constitutes an infringement of the rights

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¹ *Commission*, Proposal for a Directive on copyright in the Digital Single Market, COM(2016) 593 final, 3.

² See, for instance, *OB Arewa*, Youtube, UGC, and Digital Music: Competing Business and Cultural Models in the Internet Age, 104 (2) Northwestern University Law Review 431 (471) (2010).

³ *Commission*, Proposal for a Directive on Copyright in the Digital Single Market, COM(2016) 593 final.

⁴ *Ibid.*, 5.

⁵ On headlines, see *S Stokes*, Digital Copyright. Law and Practice, Hart Publishing, Oxford 2009, p. 131; *T Aplin*, Copyright Law in the Digital Society. The Challenges of Multimedia, Hart Publishing, Oxford 2005, pp. 149-150.

⁶ Judgment C-5/08, EU:C:2009:465, para 48 – *Infopaq International A/S v. Danske Dagblades Forening*.

of reproduction or making available to the public, it is probable that some headlines and snippets constitute such an act, due to the relatively low threshold of originality for literary works.⁷ In addition, news aggregators' sites often include images emanating from original news articles and, notwithstanding the technique by which they are employed in the service, use *de facto* might in many cases have a similar impact to acts of reproduction and making available to the public.

The traditional quotation exception might not be easily applicable to automated acts of contemporary online services. Art. 5(3)(d) of the InfoSoc Directive enables citing quotations for such purposes as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to public criticism or review. Quotations, the source of which must be indicated unless impossible, must relate to a work or other subject-matter which has already been lawfully made available to the public. Quotations must also be used in accordance with fair practice and to the extent required by the specific purpose. A quotation should somehow assist creative work.⁸ If the sole purpose of a quotation is to add content-related or visual value to the presentation, the requirement of fair practice is not fulfilled.⁹ It has been argued that the aim of search engines is to enable finding material and not to quote the creative work, so that search engines could not resort to the quotation exception.¹⁰ Similarly, the quotation exception is unlikely to benefit online services that automatically reproduce and communicate to the public excerpts from copyright-protected material.

The assessment of linking as a potential copyright infringement is of great significance for news aggregation. Over the past few years, the CJEU has issued several preliminary rulings on linking as an act of communication to the public. In *Svensson v. Retriever Sverige* the CJEU concluded that provision on a website of clickable links to works freely available on another website does not constitute an act of communication to the public, since there is no new public.¹¹ In the case of *BestWater International v. Mebes and Potsch* the CJEU concluded that creating links to copyright

protected works freely available on the internet using a framing technique cannot be classified as communication to the public if the works is not transmitted to a new public.¹² In addition, in the case of *GS Media*, linking to material freely available without rightholders' consent as an act of communication to the public was considered.¹³ The court concluded that assessment must address whether links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known of the unlicensed nature of the publication of those works on the other website or whether, on the contrary, links are provided for such a purpose, a situation in which that knowledge must be presumed. In *Filmspeler* the court held that the sale of a multimedia player with pre-installed add-ons containing hyperlinks to websites freely accessible to the public, on which copyright-protected works have been made available to the public without the consent of the right holders, was communication to the public.¹⁴ The court referred to *GS Media* and stated that in the case at hand it was evident that the sale was made in full knowledge that add-ons containing hyperlinks gave access to works published unlicensed on the internet.¹⁵ In addition, the multimedia player is supplied with a view to making a profit, the price for the multimedia player being paid in particular to obtain direct access to protected works available on streaming websites without the consent of copyright holders.¹⁶ Even though the CJEU seems to intentionally avoid discussing the difficult question of how the various interests should be weighed and balanced in the linking assessment, it does not seem to have found the linking technique used to be relevant when assessing linking as communication to the public.¹⁷

For news aggregators and other services, the line adopted by the CJEU means that they can easily link to news articles that are freely available on the internet with the rightholder's consent. The CJEU's willingness in *GS Media* to give relevance to the commercial or non-commercial nature of the service might be a slight indication of stressing legitimate interests rather than focusing only on technically-oriented aspects, even though the case certainly leaves difficult questions unanswered. These relate, for instance, to how the aim of making a profit should be determined. The conclusions drawn in *GS Media* and *Filmspeler* might also be problematic for news aggregators. Due to the presumption by the CJEU on link providers seeking financial benefits, according to which their knowledge of the unlicensed character of the linked content is presumed, links to unlicensed material are easily considered a communication to the public. However, automatic search and linking systems used in news aggregation and social media services may not be able to recognize unlicensed material. Overall, press publishers already have quite extensive possibilities under existing copyright law to address unauthorized use by news aggregators of news content. In particular, news aggregators and other online services that provide excerpts from news articles or

⁷ Similarly, *M Stanganelli*, Spreading the News Online: A Fine Balance of Copyright and Freedom of Expression in News Aggregation, 34 (11) European Intellectual Property Review 745 (748) (2012). For instance, in a Scottish case, *Shetland Times v. Wills* [1997] SC 316 (OH), the court issued an interim injunction against a news aggregator. The Court of Session Outer House concluded that the news headlines that a defendant reproduced were original works as such. Also in the English case *Newspaper Licensing Agency Ltd v. Meltwater Holding BV* [2010] EWHC 3099 (Ch) the High Court of England and Wales deemed headlines as such to be original works.

⁸ From a German perspective, see *T Hoeren*, Die Schranken des Urheberrechts in Deutschland, in: RM Hilty/C Geiger (eds), Impulse für eine europäische Harmonisierung des Urheberrechts. Urheberrecht im deutsch-französischen Dialog, Springer, Berlin 2007, p. 265 (277).

⁹ For instance, if the purpose of citing a quotation is solely of a decorative nature, it is not allowed. From a German perspective, see *M Bisges*, Grenzen des Zitatrechts im Internet, GRUR 8/2009, 730 (731).

¹⁰ From the perspective of image search, see *G Spindler*, Bildersuchmaschinen, Schranken und konkludente Einwilligung im Urheberrecht. Besprechung der BGH-Entscheidung "Vorschaubilder", GRUR 9/2010, 785 (788). In the Belgian case *C.A. Bruxelles*, 5 May 2011, 2007/AR/1730 – *Copiepresse v. Google*, the court did not consider a news aggregation service's actions as permitted under the quotation exception since the defendant did not comment, criticize or compare the content utilized.

¹¹ Judgment C-466/12, EU:C:2014:76, para 30 – *Svensson and Others v. Retriever Sverige AB*. For more about the case, see, for instance, *E Arezzo*, Hyperlinks and Making Available Right in the European Union – What Future for the Internet after Svensson?, 5 International Review of Intellectual Property and Competition Law 524 (2014).

¹² Judgment C-348/13, EU:C:2014:2315 – *BestWater International GmbH v. Michael Mebes and Stefan Potsch*.

¹³ Judgment C-160/15, EU:C:2016:644 – *GS Media BV v. Sanoma Media Netherlands Bv and Others*.

¹⁴ Judgment C-527/15, EU:C:2017:300 – *Stichting Brein v Jack Frederik Wullems (Filmspeler)*.

¹⁵ *Ibid.*, para. 50.

¹⁶ *Ibid.*, para. 51.

¹⁷ However, the *Association Littéraire et Artistique Internationale*, "ALAI Report and Opinion on a Berne-compatible reconciliation of hyperlinking and the communication to the public right on the internet" is based on distinct legal status given in the context of communication to the public, for cases of hyperlinking, and, on the other hand, for cases of deep linking and framing. See <<http://www.alai.org/en/assets/files/resolutions/201503-hyperlinking-report-and-opinion-2.pdf>> (accessed 5 October 2017).

images may infringe exclusive rights of reproduction and communication to the public. However, news aggregators may be able to design their services so that they avoid at least direct copyright infringement.

2. News aggregation as potential abuse of a dominant position?

Activities of news aggregators and other online services that use third-party news content may be contrary to EU competition law in some situations. As competition law covers aspects of conduct that copyright law does not normally extend to (e.g. licensing practices) and competition law violations do not require that conduct infringes copyright, competition law may provide relief to press publishers beyond copyright law.

Despite being potentially more broadly applicable, EU competition law (Arts. 101 and 102 of the Treaty of the Functioning of the European Union (TFEU)) contains features that significantly limit the ability of press publishers to rely on it against unauthorized use of third-party news content. In particular, unilateral conduct is only addressed under Art. 102 TFEU, which prohibits abuse of a dominant position. Since news aggregation can be implemented entirely unilaterally, without involving agreements or cooperation with other undertakings that fall under Art. 101 TFEU, the activity is only subject to the requirements of Art. 102 TFEU. As most news aggregators are unlikely to be dominant in any relevant market, their unauthorized use of third-party content will generally not be subject to any EU competition law rules.

When a news aggregator is dominant in a relevant market, using content from news publishers without consent may in principle constitute abuse. However, the conditions under which unauthorized use of content would constitute abuse have not yet been addressed by the CJEU and limited Commission or national decisional practice or case-law concerning the question is available.¹⁸ In terms of the general concept of abuse in EU competition law, characterized as conduct harming competition by means other than normal competition,¹⁹ unauthorized use of press content could unjustifiably harm competition (e.g. by hampering the ability of rival news services to compete) and ultimately consumers. However, it may be unusual for news aggregation to harm competition, as distinct from harming the interests of press publishers, and for conduct not to be normal or merits-based competition or justified by its benefits to consumers. News aggregation can particularly benefit press publishers by directing traffic to their websites and consumers by making news discovery and consumption more convenient. These benefits of news aggregation may typically preclude a finding of abuse or justify *prima facie* abusive conduct.

The issue of whether news aggregation may constitute abuse could be clarified in the future as the European Commission is

investigating concerns that Google abuses its dominant position by using rivals' content, without consent, in its specialized search services. The Commission is concerned that unauthorized use of content from rival websites may divert traffic from those websites and threaten incentives to invest in creation of content, including using content from news publishers in the Google News service.²⁰ However, the Commission has not yet issued a statement of objections or otherwise stated a clear position on this question.²¹

Whether other aspects of activities by news aggregators or other services using news content could be abusive has not been subject to EU-level decisions either. However, some national competition authorities have indicated that it could constitute abuse if Google were to disproportionately punish third-party websites that do not wish their content to be included in the Google News service. The Italian Competition Authority has accepted commitments that enable news publishers to opt out of Google News, at the level of individual articles instead of the entire website, without the risk of being penalized.²² The German Federal Cartel Office has stated that it would be problematic if Google was to entirely remove from Google News content from news publishers that have not consented to royalty-free use of snippets, while not finding abusive presentation of abbreviated snippets if publishers have not given consent.²³ Additionally, the European Commission's decision finding Google's comparison shopping abusive suggests that demoting news publishers in search results could be abusive if not properly justified.²⁴

Accordingly, unauthorized use of press content in online services may amount to abuse of a dominant position, including in situations where copyright law sees no infringement. However, this only concerns the few services that are dominant in a relevant market, and abuse would be exceptional as news aggregation or

²⁰ *Commission*, Commission seeks feedback on commitments offered by Google to address competition concerns – questions and answers, MEMO/13/383 (25. April 2013).

²¹ Although relating to different kinds of conduct and concerns, the recent Commission finding, namely that Google abused dominance by hampering competition in comparison shopping services, could provide support for claims that news aggregation may distort competition by giving an improper advantage to Google's own news service and disadvantaging rival services to which web traffic is reduced. Commission, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service, IP/17/1784 (27 June 2017).

²² *Italian Competition Authority* (Autorità Garante della Concorrenza e del Mercato), Antitrust Authority Accepts Google Commitments and Implores Parliament to Update Copyright Laws, Press Release A420 – AS787 (17 January 2010) (in particular, the commitments include that: "1) Google ensures the provision of separate Google News software that allows publishers to choose the journalistic contents to propose through Google News without jeopardizing the indexing on the Google Web Search engine. More specifically, publishers can decide whether or not to provide Google News with access to their own sites, to selectively exclude specific articles or images and to display article titles without any text excerpts.")

²³ German Federal Cartel Office (Bundeskartellamt), Bundeskartellamt Takes Decision in Ancillary Copyright Dispute, Press release (9 September 2015) ("We made it clear, on the other hand, that a complete delisting of individual publisher websites from Google's results could be an infringement of competition law."). In its decision, the German authority found that Google was not engaging in otherwise abusive exclusion, discrimination or unfair practices claimed as regards certain other aspects of the conduct. German Federal Cartel Office, decision of 8 September 2015, case B6-126/14. In a separate case, a first instance court (Landgericht Berlin) rejected similar claims, see Case 92 O 5/14 Kart, Landgericht Berlin, (19 February 2016).

²⁴ *Commission*, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service, IP/17/1784 (27 June 2017).

¹⁸ See on existing (national) decisions *J Turner*, Intellectual Property and EU Competition Law, 2nd edn, Oxford University Press, Oxford 2015, p. 158.

¹⁹ Judgment Case 85/76, EU:C:1979:36, para. 91 – *Hoffmann-La Roche v. Commission*, ("The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."); Commission, Guidance on the Commission's enforcement priorities in applying Art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C 45/7.

other use of news content in online services does not inherently harm competition and features various benefits to competition and consumers. Abuse would require that at least potential competitive harm is established and that the benefits of the practice are sufficiently excluded. This limits abuses to rare circumstances, which online services may be able to avoid by allowing news publishers to control use of their content in services and by refraining from penalizing those who do so and imposing disproportionate licensing terms on news publishers. EU competition law therefore plays a limited role in tackling Commission concerns about enforcement and licensing difficulties faced by news publishers.

III. Commission proposal on a right of press publishers: protected subject-matter and exclusive rights

The European Commission has proposed that press publishers be granted a neighbouring right protecting press publications that would cover digital uses constituting reproduction or making available to the public.²⁵ Below, the key features of the proposed neighbouring right are discussed, along with questions that the proposal leaves unclear.

1. Protected subject-matter

The proposal defines 'press publication' in an expansive way that essentially covers collections of journalistic works and other subject-matter published with the purpose of providing information under editorial control.²⁶ The fixation of a collection needs to meet the following requirements in order to qualify for protection as a press publication. First, fixation of a collection must include literary works of a journalistic nature to qualify for protection. In other words, threshold requirements of originality and a journalistic nature apply to press publications. However, once literary works of a journalistic nature are included in the collection, protection extends to other works and subject-matter in the collection. For instance, this would mean that weather reports and sports results would be protected if accompanying journalistic works.

Secondly, the collection must constitute an individual item in a periodical or regularly updated publication published under a single title. Examples include issues of newspapers and magazines, as well as websites.²⁷ Thirdly, the purpose of the collection must be to provide information related to news or other topics. This includes the purpose of entertaining, but not academic and scientific purposes.²⁸ Finally, publication must take place under the editorial initiative, responsibility and control of a service provider. Accordingly, protection mostly depends on the purpose and form of publication, whereas the qualities of the subject-matter (including originality) play only a limited role. The complex definition seems to cover almost any items that accompany literary works of a journalistic nature, regardless of whether the item is

protected as a literary work or not.²⁹ Whereas publications seeking to inform or entertain readers would be protected, academic or scientific publications would not be covered by the concept of press publication.³⁰

2. Exclusive rights of press publishers

Protection of press publications would cover digital uses falling under the rights in InfoSoc Directive Arts. 2 and 3(2), that is to say, reproduction and making available to the public.³¹ For instance, storing and displaying excerpts of press publications (e.g. individual news articles) in an online service could infringe press publishers' exclusive rights of reproduction and making available to the public.

When considering whether linking infringes the proposed press publishers' right, the right of making available to the public would still be determined by CJEU practice discussed above because Art. 11(1) links the rights to those under the InfoSoc Directive. However, recital 33 of the proposal for a Directive on copyright in the Digital Single Market states that the new "protection does not extend to acts of hyperlinking which do not constitute communication to the public". Therefore, in its proposed form, the new right would not affect the legality of linking in comparison to the situation under copyright law. If a news article is freely available on a publisher's website with the right holder's consent, linking does not constitute an act of communication to a new public, and therefore no making available to the public under the proposed right. Granting a new neighbouring right to press publishers does not change this situation, which is well-established in CJEU case-law. Therefore, for instance, acts of linking by services that consist purely of collections of hyperlinks to articles that are on the site with the rightholder's permission would not constitute an infringement of the press publishers' right.

Exclusive rights would only cover digital uses of press publications. Although in principle limiting the exclusive rights of press publishers, the concept of digital uses seems to cover all kinds of online services and processing on digital devices, such as displaying news or excerpts from news in any digital device, or scanning such material to a digital form. Limitation of exclusive rights to digital uses is therefore almost meaningless, as few uses nowadays are not digital.

The proposed exclusive rights would be subject to mandatory, such as the exception under Art. 5(1) InfoSoc Directive, and optional copyright exceptions under the InfoSoc Directive, such as the quotation right conferred by Art. 5(3)(d) in the InfoSoc Directive, and certain others.³² Therefore, for instance, reproducing parts of a news article or making it available to the public in order to write a commentary on its subject-matter may fall under the exception. However, displaying headlines and snippets of news articles in search engines and news aggregation services probably would not.³³

3. Protection conferred against unauthorized use of press publications

²⁹ *C Geiger/O Bulayenko/G Frosio*, The introduction of a Neighbouring Right for Press Publisher at EU Level: the Unneeded (and Unwanted) Reform, 39 (4) European Intellectual Property Review 202 (208-209) (2017).

³⁰ Recital 33.

³¹ In addition to exclusive rights, technological measures protecting press publications and rights management information related to press publication would be protected. Art. 11(3).

³² Arts. 11(3) and 3-5; Recital 34.

³³ See above discussion in Section II.1.

²⁵ Art. 11(1).

²⁶ Art. 2(4) provides that "'press publication' means a fixation of a collection of literary works of a journalistic nature, which may also comprise other works or subject-matter and constitutes an individual item within a periodical or regularly-updated publication under a single title, such as a newspaper or a general or special interest magazine, having the purpose of providing information related to news or other topics and published in any media under the initiative, editorial responsibility and control of a service provider."

²⁷ Recital 33.

²⁸ Recital 33.

The protection that press publishers would obtain under the proposed right depends on the contents of the exclusive rights and scope of protection that press publications enjoy. As to the scope of protection, the proposal does not limit the extent of use that constitutes infringement of the proposed right. Since the conditions for protecting press publications are relatively undemanding, as discussed above,³⁴ it seems that no matter how short an extract from a press publication is or whether it meets the originality requirement, reproducing it or making it available to the public falls under exclusive rights. Such a broad scope of protection might threaten the free dissemination of information. A solution would be to tie protected subject-matter to the originality requirement as is the case for authors' rights or some other criteria that would limit which uses of the subject-matter are infringing. Additionally, the breadth of exclusive rights raises concerns. As noted above, the proposed right would cover digital uses of press publications quite extensively. For instance, blogs or social media postings incorporating news materials could infringe the neighbouring right. This might be problematic when the economic interests of press publishers are not materially threatened. As discussed below, important legitimate interests can be served by such activities, interests which neighbouring rights can undermine unnecessarily. These concerns could be alleviated by limiting the exclusive right to commercial digital use or to use that significantly affects the legitimate interest of right holders (e.g. systematic unauthorized use of news content).³⁵ Moreover, as under German national law, use of short extracts and uses other than in certain services (e.g. search engines) could be excluded from protection.³⁶

IV. Issues in the proposal

The proposed neighbouring right for press publishers could promote the ability of press publishers to protect and license content to online services. Press publishers could rely on their own right, which would seem to offer protection beyond authors' rights under copyright. This could help press publishers to require online services to conclude licensing agreements on use of news content and thus promote licensing of news content.

However, several questions remain about the ability of the right to address problems faced by press publishers and to do so in a manner that does not unnecessarily undermine other interests. These questions are addressed below.

1. Possibility of technically controlling use of news content by news aggregators and implications of design choices

The possibility for press publishers themselves to prevent unauthorized use of press content is not sufficiently recognized by the Commission proposal. This is, however, an important question since it might diminish the need for legal intervention. Various technical approaches can be used to prevent linking to and other use of material in third-party services. For instance, websites can request that services crawling the web do not index the site or parts thereof or by using metatags and robot.txt files. Instead of general

³⁴ See above, Section III.1.

³⁵ See also Draft opinion of the Committee on Culture and Education for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)), 6 February 2017), 50-51 (proposing protection to be limited to commercial uses and reducing the term of protection to three years).

³⁶ See Secs. 87f(1) and 87g(4) of the German Act on Copyright and Neighbouring rights, as last amended on 20 December 2016.

accessibility, RSS feeds can also be made available only to certain users, such as subscribers.

The availability of these kinds of technical solutions allowing publishers to determine the accessibility of content may enable press publishers to prevent unauthorized reuse of content in online services, without the need to rely on copyright or other claims. This is a factor that reduces the need for the proposed legislative intervention. However, technically controlling reuse of news content may also limit other uses of content that the publisher does not object to and involve costs and efforts that publishers and users need to incur.

The decision of a publisher as regards how to design its services also raises a question about the presence of an implied licence: is it an indication of waiving some parts of rights if a rightholder does not technically limit unauthorized reuse of content or even intentionally enables or promotes use of the material by others? Of course, it is challenging to balance the interests associated with the kind of responsibility that rightholders could have to use technical tools to prevent other services from reusing materials. Nevertheless, press publishers would arguably have an obligation to show their intent by using technical measures that can be considered ordinary in the situation and that do not hinder any other use that they desire their users to be able to engage in. As copyright harmonization in the EU does not extend to regulation of copyright assignments and waivers, national approaches to implied licences might lead to different outcomes.³⁷

2. Insufficient recognition of different effects of online services on legitimate interests

One difficulty in addressing the concerns identified by the Commission is that online services displaying news content do not form a homogenous group. This diversity is not sufficiently taken into account in the proposal, although services affect economic and other interests very differently.

One issue is the extent that news aggregation and other online services negatively affect press publishers' advertising revenues or is beneficial for them.³⁸ In its proposal, the Commission cites studies concerning the ways that consumers use online platforms. One of these studies states that 47 % of consumers read news extracts on the online service providers' websites without clicking on links to access the whole article on the newspaper site.³⁹ Of

³⁷ Recital 30 of the InfoSoc Directive states that issues related to assignments and permissions belong to national legislators. However, it is not clear whether problems related to an implied licence should be solved by national legislators. An implied licence could be evaluated as a matter directly influencing the area of harmonised exclusive rights as the CJEU might be inclined to evaluate widely the area covered by harmonization. For instance, this kind of willingness is indicated in the judgment C-5/08, EU:C:2009:465 – *Infopaq International A/S v. Danske Dagblades Forening*. See more on the implied licence in this context *T Pihlajarinne*, Setting the Limits for Implied Licence in Copyright and Linking Discourse: the European Perspective, 43 (6) International Review of Intellectual Property and Competition Law 700 (2012).

³⁸ On this discussion, see, for instance, *E Rosati*, Neighbouring Rights for Publishers: Are National and (Possible) EU Initiatives Lawful?, 47 (5) IIC 569 (2016); *M Stanganelli*, Spreading the News Online: A Fine Balance of Copyright and Freedom of Expression in News Aggregation, 34 (11) European Intellectual Property Review 745 (746-747) (2012); *F Mukaddam*, Online News Aggregation Services: The Dispute, 15 (2) E-Commerce Law & Policy 3 (3-5) (2013).

³⁹ Commission, Impact Assessment on the modernisation of EU copyright rules, Accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of

course, differences exist between different types of online services. For instance, news aggregation services that include only collections of simple hyperlinks and short extracts are inclined to direct visitors to the news publishers' site since the only way for a user to read more than only the headline of a news article is to move to the publisher's site by clicking a link. By contrast, services where a substantial part of news material is available are more likely to reduce visits to the original website.⁴⁰

Another issue is the variability of how central different online services are from a freedom of expression perspective. For instance, in some services content consists solely of consolidated news, while some services include other material as well. Displaying copyright protected works in social media services might, for instance, awaken political discussion that resorts to the core of freedom of expression due to its essential importance to democracy. In addition, news material is used in very different ways in online services. In particular, it is crucial for freedom of expression that the operation of search engines and their equivalents is not restricted without due reason.⁴¹

The proposal does not analyze its potential negative effects on freedom of expression but only mentions that the proposed right would have a limited effect.⁴² Many online services promote free dissemination of information by allowing users to access news content from one source and bolster discussion on the subject-matter of news. Crucially, therefore, copyright law should not harm the development and use of those services.⁴³ At the same time, providing incentives to produce news articles meeting high journalistic standards is vital for freedom of expression by enabling social debate and media pluralism.⁴⁴

In order to take into account these differences between online services that use press content, the proposed press publishers' rights should differentiate in a more appropriate fashion what kind of online news utilization is concerned than has now been proposed. This could be achieved by a test that allows case-by-case assessment.⁴⁵ Evaluating news aggregation services requires assessing the extent to which services are tools for searching and processing information, or if they are instead comparable to distributing others' copyright-protected works. Without some of these services (search engines), information would be difficult to

find, while some services only make processing material easier for users. However, as the boundaries between these types of services are far from clear, it is difficult to assess to what extent free-riding or freedom-of-speech considerations should prevail.

3. Remaining national differences causing fragmentation

Since the proposal does not affect the authors' copyright, services using news may need licences both from authors and publishers. Although the proposed right would harmonize neighbouring rights protection of press publications in the EU, differences in national laws remain as to authors' rights that may simultaneously protect press publications. These relate to an employer's position as a rightholder conferred by law, transfer of rights, written licence, verbal licence or tacitly agreed licence. For instance, in Germany copyright cannot be assigned but the author can grant either an exclusive or a non-exclusive licence. In France, economic rights can be assigned, and in the UK copyright can be assigned provided there is a written agreement.⁴⁶ In the Nordic countries economic rights can be assigned while there are no special requirements as to the form of assignment.⁴⁷ Moreover, national rules on copyright of works created by employees differ significantly. Due to these legal differences and varying contractual practices in the Member States, online services may not be able to obtain licences from press publishers, but may need also to agree with authors.

4. Problematic claim of treating news publishers equally with other neighbouring rightholders

It has often been claimed that if producers of phonograms and broadcasters are entitled to a neighbouring right, press publishers should also have such a right. Additionally, the Commission raises this argument in its impact assessment.⁴⁸ However, the Commission proposal does not set all publishers of written works in an equivalent position as, for instance, book publishers and scientific publishers normally would not benefit from protection.⁴⁹ The Commission explains their exclusion by different mechanisms in use and revenue generation: books are not distributed in online platforms, such as news aggregators and social media, while

the Council laying down rules on the exercise of copyright and neighbouring rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, (SWD(2016) 301 final), 174.

⁴⁰ In addition, the effects of news aggregation also depend on the type of news publisher concerned. Small and unknown publishers might find news aggregation more desirable than others since news aggregation makes their websites more visible to users.

⁴¹ On various internet platforms and their relationship with freedom of speech, see *BJ Jütte*, *The Beginning of a (Happy?) Relationship: Copyright and Freedom of Expression in Europe*, 38 (1) *European Intellectual Property Review* 11 (2016); *A Murray*, *Information Technology Law. The Law and Society*, Oxford University Press, Oxford 2010, pp. 110-124. On the freedom of speech argument in the context of news aggregation services, see *M Stanganelli*, *Spreading the News Online: A Fine Balance of Copyright and Freedom of Expression in News Aggregation*, 34 (11) *European Intellectual Property Review* 745 (748-750) (2012).

⁴² *Commission*, *Proposal for a Directive on copyright in the Digital Single Market*, COM(2016) 593 final, 34.

⁴³ For instance, the TRIPS convention states that protection of intellectual property rights should contribute to promotion of technological innovation and to the transfer and dissemination of technology, see *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)* 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), Art. 7.

⁴⁴ The proposal recognizes this in recital 31.

⁴⁵ See also above Section III.3. for other arguments for limiting protection.

⁴⁶ Sec. 90 (3) of the CDPA (Copyright, Designs and Patents Act 1988, United Kingdom) enacts as follows: "An assignment of copyright is not effective unless it is in writing signed by or on behalf of the assignor". Correspondingly, § 92 para. 1 of the same law specifies that an agreement on exclusive licence must be in writing.

⁴⁷ EU copyright legislation has mostly left these issues to national legislators. For instance, according to recital 30 of the InfoSoc Directive, the rights referred to in it 'may be transferred, assigned or subject to the granting of contractual licenses, without prejudice to the relevant national legislation on copyright and related rights.'

⁴⁸ *Commission*, *Impact Assessment on the modernisation of EU copyright rules*, Accompanying the document *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and neighbouring rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes*, (SWD(2016) 301 final), 159.

⁴⁹ This is because the concept of protected press publications only covers regularly or periodically updated publications comprising works of a journalistic nature with the purpose of informing: academic publications are explicitly excluded. See above discussion in Section III.1. Similarly *T Shapiro*, *EU Copyright Will Never be the Same: a Comment on the Proposed Directive on Copyright for the Digital Single Market (DSM)*, 38 (12) *European Intellectual Property Review* 771 (774) (2016).

scientific publications do not generate revenue from advertisements.

Accepting the logic of equal treatment as a basis for neighbouring rights protection would, moreover, set a precedent that would attract calls for creating new neighbouring rights for those whose situation can be compared to that of press publishers or other neighbouring rightholders. Adoption of new neighbouring rights would further complicate and fragment the system of copyright in the EU, as illustrated by experiences with the *sui generis* right for databases.⁵⁰

5. No solution to bargaining imbalances

The proposal seeks to address the weak bargaining position of press publishers in negotiations with online services. As is well-known, the earlier national ancillary rights of press publishers have proved failures in this respect. For instance, after adopting an ancillary right in Germany, many publishers have explicitly agreed to grant a licence free of charge. After Google's notice that it was going to refrain from indexing news from some press publishers who did not waive their rights, these publications brought the case to the German Federal Competition Authority.⁵¹ It is not clear why the proposed right would result in a different outcome. It is not possible by simply creating an exclusive right to remedy bargaining imbalances as this does not directly change the strong bargaining position of some news aggregation services.

V. Conclusion

The proposal might have the ability, albeit limited, to clarify press publishers' position in licensing negotiations, in comparison to relying on copyright protection under the laws of the various Member States. A broader scope of protection and reduced uncertainty about entitlement to sue could allow press publishers to better protect and license their content.⁵² However, the proposed right could unnecessarily hinder other legitimate interests as it does not take into consideration how online services use news content and serve various legitimate interests. Limiting protected subject matter or the content of the proposed right would diminish these

negative effects. At the same time, it is doubtful whether the proposal could address concerns about the weak bargaining position of news publishers, as similar national rights have proved failures in this respect. More generally, introducing a new neighbouring right would further complicate and fragment the system of EU copyright law. New rights should not be created without carefully considering whether legal intervention is necessary for protecting investment in creating works.

⁵⁰ In addition, *Ramalho* concludes that no obstacles exist to trade or distortions to competition that could be valid reasons for legal intervention by the EU. She uses *sui generis* right for databases as an example of creating uncertainty for internal markets, see *A Ramalho*, *Beyond the Cover Story – an Enquiry into the EU Competence to Introduce a Right for Publishers*, 48 (1) IIC 71 (89) (2017).

⁵¹ See *RM Hilty/K Köklü/V Moscon*, Public Consultation on the Role of Publishers in the Copyright Value Chain. Max Planck Institute for Innovation and Competition (Position Statement, Max Planck Institute for Innovation and Competition, 23 July 2016) <http://www.ip.mpg.de/fileadmin/ipmpg/content/aktuelles/MPI_Position_statement_15_6_2016_def.pdf>, accessed 7 July 2017, p. 5.

⁵² Giving press publishers the right to sue would resolve many of the concerns related to entitlement to sue. This has been proposed as an alternative solution to creating a press publishers' neighbouring right. See Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD), 14 June 2017), 4, and Draft report on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD), 8 March 2017), Committee on Legal Affairs, 38. Reliance on authors' right would avoid many of the concerns discussed above in Sections III.3. and IV.2. and could therefore be a more appropriate solution than the proposed neighbouring right.